STATE OF MICHIGAN

COURT OF APPEALS

FRANCES HOOGLAND,

Plaintiff-Appellant,

v

TREVOR KUBATZKE, MARGARITA MOSQUESA, TAMIE GRUNOW, and MICHAEL WILTSE,

Defendants-Appellees.

UNPUBLISHED
January 29, 2013

No. 307459
Bay Circuit Court
LC No. 11-003581-CZ

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

In this unlawful retaliation case brought under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, plaintiff, a former employee of Delta College, appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants, who are all managers or executive officers at the college. We reverse and remand.

Plaintiff initiated the present suit alleging that defendants constructively terminated her employment with Delta College when they retaliated against her for filing complaints of discrimination and sexual harassment. Previously, plaintiff had filed a multi-count federal complaint in federal district court solely against Delta College based on the alleged retaliatory actions. *Boensch v Delta College*, No. 10-10120-BC (ED Mich, decided March 30, 2011).[1] The federal district court granted summary disposition in favor of the college on the ground that the shortened limitations period contained in the employment contract between the parties barred plaintiff's suit. The employment contract contained the following relevant provisions:

> I agree that any action or suit against Delta College arising out of my employment or termination of employment, including, but not limited to, claims arising under State of Federal civil rights statutes, must be brought within 180 days of the event giving rise to the claims or be forever barred. I waive any limitation periods to the contrary.

[1] "Boensch" is plaintiff''s maiden name.

* * *

> I agree that any claim or lawsuit relating to my service with Delta College or any of its divisions must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

In the present case, without addressing defendants' res judicata and collateral estoppel arguments predicated on the federal action, the trial court also held that the shortened limitations period time-barred plaintiff's claim. The court reasoned that the contractual limitation applied to all claims arising from plaintiff's employment, regardless of the identity of the defendant. Accordingly, the court granted summary disposition in favor of defendants.

We review de novo a trial court's decision on a motion for summary disposition. Such motions are properly granted under MCR 2.116(C)(7) when a statute of limitations bars a claim. "In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). A trial court's interpretation of contractual language is also reviewed de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

When interpreting the meaning of contractual language, this Court's goal is to fulfill the intent of the parties as expressed in the language in the agreement. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). Contractual language that is clear and unambiguous should be given full effect according to its plain meaning unless it violates the law or is in contravention of public policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Ambiguity only exists when two provisions irreconcilably contradict each other, or when the language is "equally susceptible to more than a single meaning." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010) (internal quotation marks and citations omitted). While contractual language may be construed against the drafter, this is only appropriate when the parties' intent cannot be discerned through all available evidence. *Id.* ("Michigan courts honor parties' bargains and do not rewrite them . . . .").

Neither party disputes the clarity of the language in the employment contract or the validity of the shortened limitations period. The first limitation clause clearly barred plaintiff's right to sue Delta College. The second limitation clause broadly applies to "any claim or lawsuit relating to [her] service with Delta College." Plaintiff's suit against defendants arose out of plaintiff's service with Delta College because she was allegedly terminated from her employment in retaliation for filing a sex discrimination complaint against another employee. This limitation appears to limit plaintiff's right to sue defendants for their own discriminatory and/or retaliatory conduct. *Shay*, 487 Mich at 660-661 (unconditional words such as "any" and "all" do not permit exceptions) (citation omitted).

However, defendants must have standing to assert this limitation. Defendants were not parties to the employment contract between plaintiff and Delta College. "A person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL

600.1405. A third-party beneficiary "stands in the shoes" of the original promisee and may enforce the contract against the promissor, as long as the contract "expressly contain[s] a promise to act [for the] benefit [of] the third party." *White v Taylor Distributing Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010). While "a third-party beneficiary may be a member of a class, . . . the class must be sufficiently described." *Shay*, 487 Mich at 663. "[T]o qualify as third-party beneficiaries, the language [in the contract] must have demonstrated an undertaking by plaintiff *directly* for the benefit of [defendants] or for a sufficiently designated class that would include [defendants]." *Shay*, 487 Mich at 663 (emphasis in original); see also *White*, 289 Mich App at 735; MCL 600.1405(1).

The *Shay* Court held in part that nonparties qualified as third-party beneficiaries and could enforce a release from liability where the language broadly released "all other persons" from liability. *Shay*, 487 Mich at 665.[2] However, the *White* Court noted that a broad release of liability relating to the subject matter (e.g., "all claims") does not create an unlimited class of third-party beneficiaries when that clause immediately follows a specific release of liability to certain enumerated parties. *White*, 289 Mich App at 735-736 ("We disagree that this language invoked all humanity as released from potential liability and instead agree with plaintiffs that it in fact underscored the absolute immunity that the specified class was to enjoy.").

Although defendants argue that as executive officers of Delta college they are third-party beneficiaries of the contract, this interpretation would contradict the clear and unambiguous language of the employment contract. The contractual language did not describe any other class of persons, other than Delta College, to which the shortened period of limitations applied. Although the second limitation clause in the contract broadly applied to all claims arising from plaintiff's employment, it appears, consistent with this Court's reasoning in *White*, 289 Mich App at 735-736, that this latter clause merely clarified the scope of protection to which Delta College was entitled and did not expand the list of parties entitled to protection from the shortened limitations period. In finding otherwise, the trial court "confused and conflated *who* was being [protected] with *what* was being [protected]." *Id.* at 736 (emphasis in original).[3] The trial court erred by permitting defendants to assert a contractual defense when they were neither a party nor a third-party beneficiary of the contract. Consequently, the trial court erred by granting summary disposition in favor of defendants.

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[2] While *Shay* examined the scope of a contractual release of liability rather than the scope of a shortened period of limitations, the reasoning in *Shay* and *White* applies because both cases dealt with the capacity of nonparty defendants to assert contractual defenses. Whether the defense deals with a release of liability or a shortened limitations period has no bearing on the substantive merit of a nonparty''s ability to assert the defense.

[3] The *White* Court reasoned "[s]upporting this reasoning is *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 650; 624 NW2d 903 (2001), in which our Supreme Court held that broad language describing what was released . . . applied to the more narrowly identified persons and entities being released." *White*, 289 Mich App at 736.

Relying on the doctrines of collateral estoppel and res judicata, defendants alternatively argue that the federal district court's resolution of plaintiff's claim against Delta College precludes this Court from reconsidering the issues and claims in this case. We disagree.[4] The applicability of the doctrines of collateral estoppel and res judicata are reviewed de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004); *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

The doctrine of res judicata precludes relitigation of a claim when the instant suit is predicated on the same underlying transaction that was litigated in a prior case. *Stoudemire*, 248 Mich App at 334. The purpose of res judicata is to prevent inconsistent decisions, conserve judicial resources, and protect vindicated parties from vexatious litigation. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Michigan broadly applies res judicata to all claims that could arise from the same transaction or set of events "[to] which the parties, exercising reasonable diligence, might have brought forward at the time." *Id.* Res judicata will preclude subsequent relitigation, regardless of whether the claim is being raised in the federal or state courts. *Id.* Although federal and state courts may share concurrent jurisdiction over a dispute, a judgment "obtained in one of them . . . may be set up as res judicata in the other." *Comm'r of Ins v Arcilio*, 221 Mich App 54, 63; 561 NW2d 412 (1997) (citation and internal quotation marks omitted).

The elements of res judicata are: (1) the prior action was decided on the merits; (2) the prior decision was a final judgment; (3) both actions contained the same parties or those in privity with the parties; and (4) the issues presented in the subsequent case were or could have been decided in the prior case. *Stoudemire*, 248 Mich App at 334; *Bergeron v Busch*, 228 Mich App 618, 621; 579 NW2d 124 (1998). In contrast to a dismissal without prejudice, a court's grant of summary disposition is considered a final decision on the merits. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004), overruled in part on other grounds in *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). For purposes of res judicata, parties are in privity with each other when they are "'so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.'" *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 421; 733 NW2d 755 (2007), quoting *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004).

When comparing the present case with the prior proceeding before the federal court, it is debatable whether plaintiff's current claim is barred by res judicata. It is undisputed that the district court's grant of summary disposition to Delta College operated as a final judgment on the

[4] An appellee may argue on appeal alternative grounds for affirmance, so long as the alternative does not enhance the trial court''s original decision. *Vanslembrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008). Although the trial court did not decide this issue, defendants raised it before the trial court. *Peterman v Dep''t of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Moreover, the issue involves a legal question and all the required facts are preserved in the record. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

merits. Although defendants were not parties in the federal suit, it could be argued that defendants are in privity with Delta College because all the defensive parties claimed immunity from liability under the shortened limitations period contained in plaintiff's employment contract. Accordingly, Delta College and defendants may have asserted the same legal rights in these two proceedings.[5] Further, plaintiff sued Delta College in the prior proceeding based on the allegedly discriminatory and retaliatory actions of defendants. As such, plaintiff's claim against defendants arose from the same set of events as her claim against Delta College. Had plaintiff joined defendants as parties in the prior proceeding, the court would have been able to decide whether defendants were entitled to assert the shortened limitations period in plaintiff's contract as a defense.

However, although our Courts are more willing to find res judicata applies when a plaintiff fails to join all claims it has against a party in a single action, this Court is less willing to do so when a plaintiff fails to join permissive parties to his or her claim. In *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 630-631; 808 NW2d 471 (2010), this Court held that res judicata cannot be used to subvert the intent of the Legislature by imposing a rule of mandatory party joinder on a plaintiff where no such requirement exists by statute. Defendants offer no support for the proposition that plaintiff's CRA claim imposed a mandatory party joinder requirement on plaintiff's claim. As res judicata should not be used to punish a party from suing various defendants in different proceedings, plaintiff's claim should not be barred by res judicata.

"Collateral estoppel precludes relitigation of issues between the same parties." *VanVorous*, 262 Mich App at 479. The elements of collateral estoppel are: "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). Mutuality of estoppel exists where there is substantial identity of the parties in the two proceedings. *Dearborn Hts Sch District No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 126-127; 592 NW2d 408 (1998) (noting that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter"). In other words, "estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Monat v State Farm Ins Co*, 469 Mich 679, 696; 677 NW2d 843 (2004). However, mutuality of estoppel is not required when a party is asserting defensive collateral estoppel to defend against "a party who has already had a full and fair opportunity to litigate the issue." *Id.* at 695.

Plaintiff's claim is not barred by collateral estoppel because the federal district court did not decide the central issue in this case. Plaintiff only contests defendants' right as third parties to her contract to assert the contractual limitation, not the validity of the contractual limitation

[5] However, this is debatable because defendants offer no factual support to establish that Delta College was actually litigating in the prior proceeding to assert or defend defendants'' legal rights.

itself. Although mutuality of estoppel is not required and plaintiff may have had the opportunity to litigate this issue in the prior proceeding had she joined defendants to her cause of action, it remains clear that the district court never decided whether defendants had standing to assert the contractual limitation in plaintiff's contract. As the district court did not decide this dispositive issue, collateral estoppel clearly does not apply.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering